



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 18, 1995

Ms. Sandra C. Joseph
Open Records Counsel/Disclosure Officer
Office of the Comptroller of Public Accounts
LBJ State Office Building
111 East 17th Street
Austin, Texas 78774

OR95-637

Dear Ms. Joseph:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government. Your request was assigned ID# 31322.

The Office of the Comptroller of Public Accounts (the "comptroller's office") has received a request for certain files relating to Platinum Technology, Inc. ("Platinum"), including purchase orders, signed licensing agreements, successful bid responses, invitation to bids, bids, price quotes and correspondence. You assert that some of the requested information may be excepted from required public disclosure under section 552.110 of the Government Code. We have received a brief from Platinum arguing that this is the case.

Section 552.110 protects trade secrets from required public disclosure. The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939). *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). A trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for

example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). There are six factors listed by the Restatement which should be considered when determining whether information is a trade secret:

(1) the extent to which the information is known out side of [the company's] business; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and to [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. The governmental body or the company whose records are at issue must make a prima facie case for exception as a trade secret under section 552.110. See Open Records Decision No. 552 (1990) at 5.

Apparently, the comptroller's office has entered into a contract to purchase software and related services from Platinum. The information you have forwarded to us as responsive to the request consists of the following: an invitation for bids completed by Platinum; an evaluation matrix, memoranda, cost comparison, software evaluation approval request, and purchase order all apparently generated by the comptroller's office; and the software license agreement between Platinum and the comptroller's office. Apparently, Platinum contends that all of this information, even the documents generated by the comptroller's office, is trade secret material. It makes the following showing:

(1) The information is not known outside the company except to the extent it is protected by license agreements which contain confidentiality provisions. (2) Certain employees within the company will have access to portions of the information depending upon their duties and responsibilities within the company [A]ll employees are required as a condition of employment to execute confidentiality and non-disclosure statements at the time of hire. (3) Platinum has taken great steps to maintain the confidentiality of its proprietary information including but not limited to: limited access on a need to know basis to technical product information and pricing information; use of software pursuant to license agreements which contain confidentiality provision[s] which cover the terms of the agreements, employees are required to sign confidentiality

statements . . .; and access to Platinum facilities is limited to employees with key card badges, visitors must log in and log out with receptionists and be accompanied by an employee at all times. (4) The information is very valuable to Platinum and would be even more valuable to a competitor such as BMC. (5) & (6) Platinum has spent millions of dollars developing and acquiring its software products and conducting market research for product functionality and pricing for those products. While some of the may information may be available to BMC (i.e. the market research) we do not believe that it could be acquired without great difficulty, time and expense.

We conclude that Platinum has not established a prima facie case that the foregoing documents constitute trade secrets, *see* Open Records Decision No. 552 (1990) at 5, for the following reasons. First, much of the information you have provided was generated by the comptroller's office. We do not believe that information generated by the comptroller's office, such as the evaluation matrix comparing the merits of Platinum's bid with others', cost comparison, and memoranda justifying the purchase of the software, even meets the Restatement definition of "trade secret" as a threshold matter.

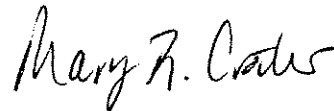
Second, the invitation for bids is contained on a form prepared by the comptroller. Clearly, an uncompleted form does not contain trade secrets. The information on the form provided by Platinum includes its vendor number and other identifying information, child support affidavit, unit prices for software maintenance during different time periods, and an explanation of how such prices were derived. The software license agreement reveals the contract price and other terms of the agreement between Platinum and the comptroller, such as terms regarding proprietary rights, indemnification, warranties, termination of the contract and contract construction. Platinum's vendor number, other identifying information, and child support affidavit as well as the general terms of its agreement with the comptroller do not consist of a formula, pattern, device or compilation of information which is used in its business, and which gives it an opportunity to obtain an advantage over competitors who do not know or use it. The pricing and product information in the invitation for bids and software license agreement could arguably fall within the definition of a trade secret. We conclude, however, that Platinum's broad allegations fail to make a prima facie case that this particular kind of information constitutes a trade secret.

Finally, we note that a governmental body such as the comptroller's office may not withhold information under the Open Records Act pursuant to a confidentiality provision in a contract unless it is specifically authorized by statute to enter into such a agreement. *See* Open Records Decision No. 514 (1988). We are aware of no statute which would authorize the comptroller's office to enter into such a confidentiality provision, and neither Platinum nor the comptroller's office argues that the confidentiality provision in the licensing agreement between the parties is enforceable.

Because Platinum has not established a prima facie case that the foregoing documents constitute trade secrets and you have raised no other exceptions to required public disclosure, the requested information may not be withheld under section 552.110 or any other provision of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/LRD/rho

Ref.: ID# 31322

Enclosures: Submitted documents

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